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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRANDON JOSEPH FRANKLIN, Defendant and Appellant.	E061445 (Super.Ct.No. RIF1309184) OPINION

APPEAL from the Superior Court of Riverside County. Irma Poole Asberry, Judge. Affirmed as modified.

Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Brandon Joseph Franklin of one felony count of carrying a concealed dirk or dagger (Penal Code,[1] § 21310; count 1) and one misdemeanor count of resisting a peace officer (§ 148, subd. (a); count 2). The trial court found true two prior prison term allegations (§ 667.5, subd. (b)). Defendant was sentenced to an aggregate prison term of four years, of which 3 years 6 months were suspended, with that time instead to be served under mandatory supervision, subject to various terms and conditions.

On appeal, defendant asserts three claims of error. First, he contends that his conviction for resisting a peace officer was not supported by substantial evidence. Second, he contends that the trial court's removal of a juror during deliberations was erroneous. Third, he contends that a term of his supervised release, requiring defendant to obtain prior approval of his residence from his probation officer, and not to move without the approval of his probation officer, should be stricken or modified. We agree with defendant that the probation condition is overbroad and must be modified. In all other respects, we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 28, 2013, two deputies of the Riverside County Sheriff's office were dispatched to an "unknown trouble" call at an address in Moreno Valley. As they arrived on scene, they observed a car parked in the middle of the road, in front of the driveway of the dispatched location, and five individuals near the car—all apparently adults, one of whom was defendant—engaged in an agitated argument. The individuals were yelling

[1] Further undesignated statutory references are to the Penal Code.

and making aggressive gestures towards one another, and the deputies were concerned that a physical altercation was imminent.

As deputies exited their vehicle and approached, defendant was walking with an angry demeanor toward one of the other individuals, a female whom one of the deputies described at trial as being "very animated, flailing her arms, yelling, screaming." As they approached, one of the deputies ordered defendant and the female to back away from each other; at that point, they were less than an arm's length apart. Both ignored the deputy's order.

Once the deputy had repeated his order two or three times, defendant stepped back from the female; he then walked towards the driver's side door of the car. The deputy ordered defendant to move away from the car door as well. Defendant did not comply, instead reaching into the car. Defendant then moved around the front of the car, toward the sidewalk, with the deputy following him.

When defendant reached the sidewalk, he turned and faced the deputy. The deputy observed that defendant's fist was clenched, and he appeared angry. The deputy told defendant repeatedly to sit down on the curb. Defendant refused to comply, saying "why do I have to sit down" in a confrontational tone that the deputy understood to mean "I'm not going to sit down."

Meanwhile, the second deputy was dealing with others on the scene, including the female, whom defendant had been confronting, and a male, who had come out of the house holding a baseball bat. Once they were under control, that deputy approached defendant from behind, and directed him to place his hands behind his back. Defendant

refused, saying that "he wasn't doing anything." The deputy then tried to pull defendant's hands behinds his back, but defendant jerked his arms away and was able to break free from the deputy's grasp. At this point, the deputy tackled him to the ground.

Once defendant was on the ground, both deputies tried to get defendant's hands behind his back to handcuff him. Defendant continued to struggle, trying to pull his hands in front of him. The deputy who had tackled defendant used some force to eventually gain control of defendant's hands, striking defendant in the back approximately seven times with his elbow. After defendant was handcuffed, a search of his person revealed a fixed blade knife—defendant called it a fishing knife—in his back pocket.

Defendant's trial was conducted over several days in April 2014. During jury deliberations, the foreperson sent a note to the trial court stating that "Juror No. 7 would like to recuse herself due to a personal bias she has towards this situation and feels she cannot be fair." At the request of both parties, the trial court questioned the juror about the request. During the jury selection process, the juror had stated that neither she nor any of her family members had been arrested for similar charges. She disclosed her own negative contact with law enforcement, an arrest for driving under the influence, but stated that she felt she had been treated fairly, and nothing about her experience would affect her ability to be fair in this case. She also stated that she had some "distant relatives and distant friends" with law enforcement connections, but indicated that nothing about those relationships caused her to have any "bad feeling about law enforcement officers."

At lunch on the day of the recusal request, however, it had occurred to her that her brother had told her about four weeks before that he had been involved in circumstances "similar" to that of this case. She felt that her brother "was actually arrested unjustly approximately seven years ago," and she was having an "issue with trying to decide" whether the deputy who tackled defendant "was operating within the confines of the law." Her brother's arrest did not involve the Riverside County Sheriff's Department, or any other agency involved in the present case. Nevertheless, she stated that "because of what happened to my brother, if he was singled out and essentially the brotherhood decided to arrest him for no real cause, I feel that my judgment is biased—will be biased." She indicated that she would want a readback of the testimony of the deputy who had tackled defendant.

The trial court questioned the juror further, attempting to discern whether she would be able to set aside her brother's arrest and consider only the evidence presented in defendant's case. The juror's answers were equivocal. She repeatedly denied any bias against law enforcement, and denied that her feeling that her brother was treated unfairly would affect her decision making in this case. She said that her reservations about the circumstances of defendant's arrest arose prior to her lunchtime realization about her brother's arrest. But the juror also stated "I just don't know that I can make a good decision. With the facts that have been presented, I'm not confident." When asked whether she has "anything against law enforcement or against the People because of [her] brother's situation," she responded "It was a situation that was unjust, so I guess,

unfortunately, I would, I suppose, in that situation. Yes." She also indicated that she had talked with her fellow jurors about her brother's arrest.

The trial court found that the juror had not intentionally withheld information during the voir dire process, crediting the juror's assertion that she had a realization during the lunch recess about what had happened to her brother. It noted, however, that even though the juror denied that she was biased against law enforcement or prosecutors repeatedly, she would then go on to "qualify her answer" in a way that caused the court to be "very concerned that she would not act fairly in this matter." The court affirmed that it was not a problem for a juror to have reservations about the evidence presented, but the circumstance that this juror had reservations "on the facts in light of her personal experiences that she has asserted," was a "concern." The trial court concluded, based on the juror's comments, that "she has lost her ability to be impartial." The trial court ordered that the juror be discharged, and replaced with an alternate juror.

II. DISCUSSION

A. Defendant's Conviction for Resisting a Peace Officer Is Supported by Substantial Evidence.

Defendant contends that his conviction for resisting a peace officer is not supported by substantial evidence. He contends that "no rational jury could find on this record that [defendant] failed to obey a *lawful* directive" from either deputy, because the deputies had no appropriate basis to detain him, and used excessive force in doing so. We disagree.

When a criminal defendant contends the evidence was insufficient to support his conviction, "'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] . . .' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."'" (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.) Put another way: "In reviewing the sufficiency of the evidence [to support a factual finding], the '"power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the [trier of fact's] findings.' [Citations.] . . . 'If the circumstances reasonably justify the [trier of fact's] findings,' the judgment may not be overturned when the circumstances might also reasonably support a contrary finding." (*People v. Baker* (2005) 126 Cal.App.4th 463, 468-469.)

"The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. [Citation.] Defendant cannot be convicted of an offense against an officer engaged in the performance of official duties unless the officer was acting lawfully at the time. [Citation.] 'The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in "duties,"

for purposes of an offense defined in such terms, if the officer's conduct is unlawful. [Citations.]'" (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108-1109.) "'Under California law, an officer is not lawfully performing her duties when she detains an individual without reasonable suspicion or arrests an individual without probable cause.'" (*Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 818-819, italics omitted.) Additionally, an otherwise justified detention or arrest is unlawful if made with excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 164.)

Defendant asserts that the deputies detained defendant without justification, and therefore were acting unlawfully. Not so. "A detention is justified 'when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.'" (*Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 820.) Disturbing the peace is criminal activity. (See § 415; *In re Bushman* (1970) 1 Cal.3d 767, 773 ["The terms 'disturb the peace' and 'breach of the peace,' which are substantially synonymous, have long been understood to mean disruption of public order by acts that are themselves violent or that tend to incite others to violence"], overruled on other grounds by *People v. Lent* (1975) 15 Cal.3d 481)

Here, as the deputies arrived on scene, they observed five individuals, including defendant, engaged in an animated argument—still verbal, but showing signs of imminent escalation to physical—in the middle of the street. As the deputies exited their car, they observed defendant walking with an angry demeanor towards a female who was acting "very animated, flailing her arms, yelling, [and] screaming." Although the

deputies had not yet observed defendant with any weapons, or observed him committing any physical acts of violence, they had ample reason to suspect he was challenging the female to fight, or otherwise acting in a manner inherently likely to provoke an immediate violent reaction from her. (See § 415, subds. (1), (3).) The deputies were well justified in detaining defendant (and the others on scene involved in the disturbance) to interrupt any potential for violence, and to further investigate whether defendant was in fact engaged in criminal activity.

Defendant further argues that the deputies who arrested him used excessive force in doing so. We find substantial evidence supports the jury's implicit determination that the force used was reasonable.

"The reasonableness of a particular use of force is judged from the perspective of a reasonable officer on the scene, not by the 20/20 vision of hindsight. The inquiry is an objective one: Was the officer's action objectively reasonable in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation? [Citation.] It is a pure question of fact whether a police officer used reasonable force in detaining a defendant, so reviewing courts determine if there is sufficient evidence in the record for a reasonable trier of fact to conclude that the force used in effectuating a detention was reasonable." (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 989.)

Here, there is ample evidence from which a reasonable trier of fact could conclude that the force used in detaining defendant was objectively reasonable. As discussed above, defendant was not tackled to the ground until he had already refused to simply sit down, and then pulled his hands away from a deputy attempting to handcuff him. Once

on the ground, defendant continued to pull his hands away, and the deputies tried, but were unable to pull defendant's hands behind his back. Defendant was not struck in a manner that injured him, and there is no evidence that he was struck at all once the deputies gained control of his hands.

Defendant emphasizes that he was struck approximately seven times, rather than just once or twice. But nothing other than his own ipse dixit assertion supports the notion that seven times must necessarily be viewed as excessive. Defendant also makes much of the testimony of the officer who did not strike him, who, when asked why not, testified that he "didn't feel it was necessary at that point." Defendant suggests, without quite arguing, that this statement should be understood to mean that the deputy did not feel it was necessary for *either* officer to strike defendant. A more reasonable interpretation of the testimony, however, is that the deputy did not feel it was necessary for him to strike defendant too; that is, that the one deputy's application of force was sufficient. The testimony does not undermine, and viewed in the more favorable light indeed supports, the jury's implicit determination that the force used in effectuating defendant's arrest was not excessive.

In short, we reject defendant's arguments, and find substantial evidence supports his conviction for resisting a peace officer.

B. The Trial Court Did Not Abuse Its Discretion by Removing the Juror for Bias.

Defendant contends that the record does not support the trial court's finding that Juror No. 7 was biased against law enforcement. We disagree.

Intentional concealment of material information by a potential juror "'may constitute implied bias justifying his or her disqualification or removal,'" but "'mere inadvertent or unintentional failures to disclose are not accorded the same effect.'" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 644.) The proper test for unintentional concealment of material information is whether the juror is sufficiently biased to constitute good cause for the court to find under section 1089 that the juror is "unable to perform his or her duty . . . ." (§ 1089; see *People v. San Nicolas, supra,* at p. 644.) "Specifically, a bias against law enforcement officers that renders a juror unable to fairly weigh police testimony is grounds for the juror's replacement." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051.)

"We review a trial court's decision to discharge a juror [pursuant to section 1089] under an abuse of discretion standard, and will uphold such decision if the record supports the juror's disqualification as a demonstrable reality. [Citation.] The demonstrable reality test 'requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [disqualification] was established.' [Citation.] To determine whether the trial court's conclusion is 'manifestly supported by evidence on which the court actually relied,' we consider not just the evidence itself, but also the record of reasons the court provided. [Citation.] In doing so, we will not reweigh the evidence." (*People v. Wilson* (2008) 43 Cal.4th 1, 26.) "'Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the state of mind of a juror . . . .'" (*People v. Debose* (2014) 59 Cal.4th 177, 202.)

We find no abuse of discretion in the trial court's determination that Juror No. 7 harbored bias against law enforcement, necessitating her removal from the jury. On the one hand, as defendant emphasizes, the juror repeatedly denied any bias, and expressed the belief that she could decide defendant's case fairly. On the other hand, she also repeatedly expressed doubt that she could "make a good decision," and expressed concern that her "judgment is biased." When asked whether she has "anything against law enforcement or against the People because of [her] brother's situation," she responded "It was a situation that was unjust, so I guess, unfortunately, I would, I suppose, in that situation. Yes." A request for a readback of testimony might, in the abstract, be interpreted as indicating a willingness to focus on the evidence presented in this case. Coming as it did in this case, in the middle of questioning regarding possible bias, Juror No. 7's readback request is reasonably interpreted as tending to show her inability to view the evidence of the present case on its own merits, rather than through the lens of her brother's experience.

In short, the trial judge, charged with interpreting the juror's equivocal statements, as well as examining her demeanor and the manner in which she responded to questioning, acted well within its discretion in determining that she harbored actual bias, and did not err by removing her from the jury on that basis.

C. The Conditions of Supervised Release Should Be Modified.

Condition No. 13 (as identified in the probation report) of the terms and conditions of defendant's mandatory supervised release reads as follows: "Inform the probation officer of your place of residence and reside at a residence approved by the probation

officer. Give written notice to the probation officer 24 hours before changing your residence and do not move without the approval of the probation officer." The substance of this condition, though not its number, was repeated in the clerk's minute order of the sentencing hearing. Defendant raises two issues with respect to this condition. First, he contends that the condition should be stricken as inconsistent with the trial court's oral pronouncement of judgment. Second, he argues that the condition is unconstitutionally overbroad, and should be modified. We reject the first argument, but agree with the second.

1. The condition was properly incorporated by reference in the oral pronouncement of judgment.

Defendant notes that the trial court's oral pronouncement of judgment did not include a recital of condition No. 13. He contends on this basis that the condition should be stricken, because the "oral pronouncement of judgment controls over inconsistencies in the written minute order prepared by the clerk." We find no inconsistency between the minute order and the pronouncement of judgment.

"[P]robation conditions 'need not be spelled out in great detail in court as long as the defendant knows what they are; to require recital in court is unnecessary in view of the fact the probation conditions are spelled out in detail on the probation order and the probationer has a probation officer who can explain to him the contents of the order.'" (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 586.) "The probation report's proposals may become the court's order if the court either incorporates them by reference or quotes them." (*Ibid.*)

The probation report prepared in advance of defendant's sentencing recommends that defendant serve a portion of his sentence under mandatory supervised release, and itemizes a number of recommended conditions, including the challenged condition No. 13. The trial court's oral order incorporated all of the recommended conditions by express reference: "I do intend also to impose fees and fines and the other terms recommended by the probation officer." Accordingly, defendant's argument that condition No. 13 should be stricken as inconsistent with the pronouncement of judgment is without merit.

2. *The condition should be modified to be reasonably related to the state's interest in defendant's reformation and rehabilitation.*

Defendant contends the residency approval condition is unconstitutionally overbroad because it does not impose any limits on the probation officer's discretion. We agree.

"Trial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and to protect public safety . . . .' [¶] However, the trial court's discretion in setting the conditions of probation is not unbounded."[2] (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) A term of probation is invalid if it: "'(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .'" (*People v. Lent* (1975) 15 Cal.3d 481, 486.)

[2] Mandatory supervision is different from probation in some respects, but it is reasonable to look to the law on probation for guidance on the matters at issue in this case, as both parties have done in their briefing on appeal.

"If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens."'" (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.) "[W]here an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored, '"reasonably related to the compelling state interest in reformation and rehabilitation . . . ."'" (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942 (*Bauer*).)

In *Bauer*, cited by defendant, the reviewing court struck a nearly identical residence approval probation condition, stating: "The condition is all the more disturbing because it impinges on constitutional entitlements—the right to travel and freedom of association. Rather than being narrowly tailored to interfere as little as possible with these important rights, the restriction is extremely broad. The condition gives the probation officer the discretionary power, for example, to forbid appellant from living with or near his parents—that is, the power to banish him. It has frequently been held that a sentencing court does not have this power." (*Bauer, supra*, 211 Cal.App.3d at pp. 944-945.)

Similarly, in this case, condition No. 13 is not narrowly tailored to be reasonably related to the state's interest in defendant's reformation and rehabilitation. As in *Bauer*, the condition gives defendant's probation officer the unfettered power to prevent him from living anywhere the officer decides is unsuitable. The potentially arbitrary nature of such a condition is not justified under the circumstances of this case. Nothing about defendant's current offenses raises any particular concerns with respect to his residence,

and he is separately required to stay away from the location where his current offenses were committed. And neither the trial court nor the probation officer expressed any concerns regarding defendant's residence.

In arguing that the condition should be upheld, the People suggest that "[w]ithout the residence approval conditions, appellant could choose to live in a residence where weapons or drugs are used or sold or a residence where gang members dwell." The argument is without merit. Other conditions of defendant's supervised release, which he has not challenged on appeal, require that he refrain from using controlled substances unless lawfully prescribed; require that he submit to drug testing; forbid him from owning or possessing a firearm; and forbid him from associating with any unrelated person he knows to be on probation or parole, to be a gang member, or to be a possessor, user, or trafficker of controlled substances. The People have articulated no reason why his probation officer's prior approval of his residence might also be necessary to keep defendant away from drugs, weapons, and unsavory associates, in light of these other conditions of his supervision.

The People also cite to *People v. Olguin* (2008) 45 Cal.4th 375, 383 (*Olguin*), for the proposition that we should presume that the probation officer will not withhold approval for irrational or capricious reasons. In *Olguin*, the Supreme Court upheld a probation condition requiring the defendant inform the probation officer of the presence of any pets in his residence. (*Ibid.*) It did so in part, however, because the condition did not require the defendant to obtain permission from his probation officer to obtain or keep any pet, only to inform the probation officer of the pet's presence at his place of

residence and to give timely notice prior to any changes in that situation. (*Id*. at pp. 383, 385.) Analogously, here, condition No. 13 could have been more narrowly tailored to the state's interests by requiring defendant only to give his probation officer notice of his place of residence, and any changes thereto, rather than requiring prior approval.

To be sure, it is necessary for the probation officer to know where defendant resides to properly supervise him and aid in his rehabilitation. We therefore do not simply strike condition No. 13. Condition No. 13 should be modified to read as follows: "Keep the probation officer informed of your place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence."

III. DISPOSITION

Condition No. 13 (as identified in the probation report) of the conditions of defendant's mandatory supervised release is modified to read: "Keep the probation officer informed of your place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence." In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MILLER
J.